

THE LOCAL HUMAN RIGHTS LAWYERING PROJECT

Legal aid attorneys¹ fight every day to secure basic rights for the most vulnerable persons in the U.S.—among them, the poor, racial minorities, young people, the elderly and immigrants. Yet, U.S. law more often than not falls short of providing a “floor” of minimum protections for these marginalized individuals. More expansive guarantees are protected under international human rights law and some advocates in the U.S., including legal services attorneys, have begun successfully incorporating human rights norms, language and strategies into their domestic work to help advocate for increased protections.

In November 2011, the Center for Human Rights & Humanitarian Law at American University Washington College of Law (the “Center”) launched the Local Human Rights Lawyering Project. The Local Human Rights Lawyering Project (the “Project”) aims to normalize international human rights law at the local level by incorporating the use of the international human rights framework into the everyday work of legal aid attorneys in the United States. In February 2012, the Center selected Maryland Legal Aid and Texas RioGrande Legal Aid as the first Project Partners. Since then, the Project Partners have each received funding from the Center to hire a human rights coordinator, who serves as a “point person” and promoter of the use of human rights within their organization. In addition, the Project Partners have attended human rights trainings in New York, Washington, D.C., and Texas, and will attend several additional trainings during the 2-year long partnership with the Center. The Center has also distributed a written handbook containing practical and useable human rights information, and sample arguments to add to briefs and oral arguments, to each and every attorney at both partner organizations. Both partner organizations have begun to integrate human rights into their daily work, both in legal arguments, the client-lawyer relationship and into office systems.

1. THE CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW

For nearly a decade, the [Center for Human Rights & Humanitarian Law](#) (the “Center”) has been working on various initiatives to integrate human rights into the work of lawyers and activists in the United States. The Center holds an ongoing series of workshops, conferences and trainings to build capacity with practitioners in the United States around the existence, application and use of international human rights norms in the United States. This effort, which has focused on trainings around using the UN Human Rights Treaty Bodies, writing “shadow reports,” using the Inter-American Commission on Human Rights and more, is aimed at practitioners in the United States who engage in domestic social justice work. It seeks to enhance their understanding of international law and the ways that it can be applied in their work in the United States, seeking to bridge the disconnect between the United States’ promotion of human rights abroad and its adherence and appreciation for international law and standards as they apply within the United States. The Local Human Rights Lawyering Project is the result of several years of research and needs assessments to consider the most effective ways to reach out to legal services organizations and build a replicable model for integration of human rights in the local lawyering context.

¹ For the purposes of this Project, the term “Legal Aid attorney” refers to lawyers that work for nonprofit organizations that provide free advice and legal representation to low income people in the U.S., which includes organizations that are funded by the Legal Services Corporation (“LSC”), as well as those that receive no funding from LSC.

The Center was established in 1990 to provide scholarship and support for human rights initiatives around the world. The Center works with students, academics and practitioners to enhance the understanding and implementation of human rights and humanitarian law domestically, regionally and internationally. The Center explores emerging intersections in the law and seeks to create new tools and strategies for creative advancement of international norms.

2. PROJECT PARTNERS

[Maryland Legal Aid Bureau, Inc.](#) (MDLAB) is a private, non-profit, multi-funded law firm providing free legal services to low-income people, children and the elderly since 1911. MDLAB's mission is to provide high-quality legal services to Maryland's poor through a mix of services and to bring about the changes poor people want in the systems that affect them. MDLAB serves Baltimore City and Maryland's 23 counties from 13 office locations. MDLAB's clients are provided necessary legal assistance to gain protection from domestic violence, retain custody of children, fight unlawful evictions, prevent foreclosures on homes, secure educational services, and obtain needed medical and disability benefits, unemployment insurance, and other forms of temporary financial assistance. Special statewide programs provide representation and assistance for children who are victims of abuse and neglect, the elderly, nursing home and assisted living residents, migrant and seasonal farmworkers, tenants working to preserve affordable housing, and home owners facing foreclosure due to predatory lending. In 2010, MDLAB adopted a human rights framework to guide its mission of finding legal remedies for the problems that afflict the poor—and to advance the recognition and protection of basic human rights.

[Texas RioGrande Legal Aid, Inc.](#) (TRLA) is a non-profit organization that provides free legal services to low-income residents in sixty-eight counties of Southwest Texas, and represents migrant and seasonal farm workers throughout the state of Texas and six southern states: Kentucky, Tennessee, Alabama, Mississippi, Louisiana and Arkansas. In addition, TRLA operates public defender programs in several Southwest Texas counties, representing the poor who are accused of felonies, misdemeanors and juvenile crimes. TRLA is the third largest legal services provider in the nation and the largest in the state of Texas. TRLA serves approximately 25,000 clients each year. However, over 2.6 million residents of Southwest Texas are considered eligible for TRLA services, a ratio of almost 21,000 potential clients per lawyer. Moreover, there are more than three dozen practice areas in which TRLA attorneys specialize, including colonias and real estate, civil rights, environmental justice, labor and employment, public benefits, disaster assistance, federally subsidized housing, foreclosure, bankruptcy, wills and estates, border issues, human trafficking, and international child abduction.

3. INTRODUCTION TO HUMAN RIGHTS

Human rights recognize and promote dignity, fairness and opportunity for all people. These norms recognize the inherent interrelationship between economic, social, cultural, civil and political rights.²

² See e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR]. See also Martha Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUMAN RIGHTS L. REV. 157 (2010).

And, a human rights framework places a duty on governments to respect, protect and fulfill these rights.³

International human rights law is part of international law, and is designed to promote and protect human rights at an international, regional and domestic level. International law is binding on state and federal courts through the Supremacy Clause of the U.S. Constitution and sources of international human rights law serve as persuasive authority in U.S. courts and can bolster arguments based on domestic law. Indeed, the U.S. Supreme Court has recognized that the laws of the U.S. should be interpreted as consistent with international law whenever possible.⁴

International law is formed by written documents as well as common practices. One widely accepted definition of international law includes “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”; “international custom, as evidence of a general practice accepted as law”; and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁵ Each of these sources of international human rights law is introduced below: “international conventions” in Section 3.1, “customary international law” in Section 3.2, “decisions of international and foreign courts” in Section 3.3, and “general principles and guidelines in Section 3.4.

3.1. INTERNATIONAL CONVENTIONS

International human rights treaties and other instruments, such as declarations, make up the core of human rights law. The U.S. has **ratified** (and thereby become a **party to**) some of the treaties listed below. However, for the majority of the treaties discussed below, the U.S. has **signed** but not ratified the treaty. The degree of legal authority or relevance that treaties have in U.S. courts depends in large part on whether the U.S. has ratified, signed, or taken no action on them.

Treaties that the U.S. has ratified are binding *as a matter of domestic law* (i.e. creating obligations of the State toward its people) under the Supremacy Clause of the U.S. Constitution and *as a matter of international law* (i.e. creating obligations of the State toward other States). The Supremacy Clause of the U.S. Constitution establishes that “all treaties made, or which shall be made, under the authority of the U.S., shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”⁶ Under the

³ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). *See also* International Covenant on Civil and Political Rights, Preamble, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), *ratified by the U.S.* Sept. 8, 1992 [hereinafter ICCPR].

⁴ *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *Talbot v. Seeman*, 5 U.S. 1, 43 (1801) (“[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”). *See generally* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 81 (2006) (likening the “liberty” rights of the Fourteenth Amendment’s Due Process Clause to fundamental international human rights); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 44 (2004) (describing the framers’ and early Justices’ recognition of the importance of international law).

⁵ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (“A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”).

⁶ U.S. CONST. art. VI, § 2.

Supremacy Clause, treaties, just like the U.S. Constitution and federal statutes, trump state constitutions and statutes.

However, ratified treaties are enforceable in a U.S. court only if they are **self-executing** or if **implementing legislation** has been passed.⁷ The Senate typically ratifies human rights treaties with “reservations” stating that they are not “self-executing,” and the courts uphold this limitation. The U.S. reservations for each treaty are available along with the treaty text on the websites listed with each treaty in the charts below.⁸

Treaties that the U.S. has signed, but not yet ratified, are not binding as domestic law. Signed-but-not-ratified treaties are nevertheless relevant to domestic law because they create general **negative obligations**.⁹ Under the Vienna Convention on the Law of Treaties (Vienna Convention), a State that has signed a treaty has an obligation “to refrain from acts which would defeat the object and purpose of a treaty,” unless and until that State has expressed its intention not to become a party.¹⁰ Because the U.S. has signaled its intention to abide by the principles contained in treaties it has signed, and because the U.S. has an obligation not to act in contravention of the object and purpose of those treaties, advocates may, when appropriate, argue that the federal/state/local government has violated them.

A treaty that the U.S. has only signed—or even a treaty that the U.S. has neither signed nor ratified—can still serve as a powerful advocacy tool in U.S. courts if it has acquired the status of customary international law through broad ratification by many other countries. For example, many of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are arguably customary international law, as the U.S. is one of the very few countries that has not ratified these treaties.

3.2 CUSTOMARY INTERNATIONAL LAW

Customary law is an independent source of international law, defined as “a general practice accepted as law.”¹¹ In order for a practice to become customary international law, States must follow it out of a sense of legal obligation, not as a matter of policy or self-interest, and enough States must

⁷ The Supreme Court has held that some treaties require implementing legislation (domestic legislation allowing for implementation of treaty provisions in the U.S.) in order to be enforced in a U.S. court. Self-executing treaties do not require such implementing legislation; they can be enforced in a U.S. court as soon as the U.S. becomes a party. See *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008). However, President Bill Clinton issued an executive order in 1998 ordering U.S. implementation of international human rights treaties “to which it is a party, including the ICCPR, the CAT, and the CERD.” Exec. Order No. 13107, 63 Fed. Reg. 68991 (Dec. 15, 1998).

⁸ A full list of human rights treaties that the U.S. is at present, or has been, party to is listed on the Bureau of Democracy, Human Rights and Labor, of the U.S. Department of State’s website, at <http://www.humanrights.gov/references/international/>.

⁹ A “positive obligation” refers to an obligation to act, to secure the actual and effective realization of human rights. In contrast, a “negative obligation” is an obligation to not act, to merely refrain from engaging in human rights violations.

¹⁰ Vienna Convention, art. 18, *supra* note 3. While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention’s provisions have become customary international law. See, e.g., Maria Frankowska, *The Vienna Convention on the Law of Treaties Before U.S. Courts*, 28 VA. J. INT’L L. 281, 299-300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

¹¹ Statute of the International Court of Justice, art. 38(1)(b), *supra* note 5. See also RESTATEMENT, *supra* note 5 (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

follow it to be considered “general practice.”¹² The meaning of each of the above variables—“general,” “practice,” and “accepted as law”—has been the subject of debate in the legal community. However, some norms in international law, such as the prohibition on torture, are widely accepted as falling within the scope of customary international law.¹³

U.S. courts have long recognized that customary international law is a part of American law.¹⁴ Moreover, both federal and state courts apply international human rights law, as well as international practices, in deciding domestic cases. Courts use international human rights law as an interpretive guide, to give content to general concepts such as standards of need and due process, and in further support of analyses under domestic law. Here are some examples of U.S. courts that have used human rights law as an interpretive guide:

In *In Re White*, the California Court of Appeals cited the Universal Declaration of Human Rights in support of its conclusion that both the U.S. and California Constitutions protected the right to intrastate and intramunicipal travel, a matter upon which the U.S. Supreme Court had not ruled, as well as the right to interstate travel, which a Supreme Court ruling has protected.¹⁵ At issue in *White* was a challenge to a condition of probation imposed for prostitution; the condition barred the probationer from entering or simply being in certain defined areas of the city.

Courts also apply the directive to interpret domestic law to be consistent with international law by looking to human rights law as a source of content in cases where domestic legal standards are ambiguous or vague. For example, in *Boehm v. Superior Court*, indigent plaintiffs sought to prevent the reduction of general assistance benefits for indigent persons.¹⁶ A state statute provided that “[e]very county . . . shall relieve and support all incompetent, poor, indigent persons” and required each county to adopt standards of aid and care. While the statute gave counties discretion to determine the type and amount of benefits, the court held that benefit levels must be sufficient for survival. In making the determination, the court required the county to consider the need for food, housing, transportation, clothing, and medical care and cited the Universal Declaration of Human Rights (the declaration refers specifically to these elements).¹⁷

A similar example of the use of international law is *Lareau v. Manson*, in which a federal district court considered whether alleged overcrowding and other prison conditions violated the due process clause of the U.S. Constitution.¹⁸ As part of its analysis, the court looked to the United Nations’ Standard Minimum Rules for the Treatment of Prisoners, a nonbinding document. The court reasoned that these standards constituted an authoritative international statement of basic norms of human dignity and thus could help define the “canons of decency and fairness which express the norms of

¹² See, e.g., *North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, I.C.J. Reports 1969 41-44, at <http://courses.kvasaheim.com/ps376/briefs/ojf38491brief4.pdf>.

¹³ For an overview of customary international law, see e.g. LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN & DIANE F. ORENTLICHER, *HUMAN RIGHTS* 193-97 (2d ed., Thomson Reuters/Foundation Press 2009).

¹⁴ See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice...as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations....”).

¹⁵ 97 Cal. App. 3d 141, 148-49 (Cal. App. 5th Dist. 1979).

¹⁶ 178 Cal. App. 3d 494, 502 (Cal. App. 5th Dist. 1986).

¹⁷ *Id.*

¹⁸ 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) *aff’d in relevant part*, 651 F.2d 96 (2d Cir. 1981).

justice embodied in the Due Process Clause” and the “evolving standards of decency” relevant to evaluating Eighth Amendment challenges.¹⁹

Further, the court in *Lareau* noted that the standard minimum rules might have acquired the force of customary international law and thus constituted binding legal authority. The court also cited the International Covenant on Civil and Political Rights, which had not then been ratified by the U.S. Nevertheless, the court considered it to have been so widely adopted that it constituted customary international law.²⁰ This is particularly significant because the analysis supports the use in litigation of the International Covenant on Economic, Social and Cultural Rights, the treaty that contains the most detailed protection of the right to housing (and other economic rights) but has not yet been ratified by the U.S.

The practices of other nations can be also relevant even if they do not support a claim of customary international law. Courts, including the U.S. Supreme Court, cite and rely on such practices without analyzing whether they rise to the level of customary international law. For example, in a 1997 decision concerning the constitutionality of a state law banning assisted suicide, the Court cited the practices of other countries (in particular, “Western democrac[ies]”).²¹ Recently, the Supreme Court cited the practices of other nations, as well as international treaties, in its decision that abolished the death penalty for juveniles.²² Several federal courts have recognized such norms in dicta,²³ and continued advocacy will increase the prominence of international human rights in domestic proceedings.

3.3 DECISIONS OF INTERNATIONAL AND FOREIGN COURTS

A number of courts around the world have built up rich jurisprudence concerning government duties and human rights, and that jurisprudence can inform U.S. judges as they reason through similar legal issues. While not all judges are equally open to looking to foreign case law to inform their decisions,²⁴ there is strong Supreme Court jurisprudence to support the use of foreign case law, in appropriate circumstances, as a comparative perspective on U.S. legal questions. For example, in *Roper v. Simmons*, Justice Kennedy, in a majority opinion joined by Justices Stevens, Souter, Ginsburg and Breyer, observed that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”²⁵ The Court has expressly looked to the laws and opinions of other nations in determining issues pertaining to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution,²⁶ as well as issues pertaining to the fundamental rights of freedom and privacy and universal concepts, such as “human dignity.”²⁷

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Washington v. Glucksberg*, 521 U.S. 702, 710 n.8 (1997).

²² *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005); *Graham v. Florida*, 130 S. Ct. 2011; 176 L. Ed. 2d 825 (2010).

²³ *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710 n.8 (1997); *Dandridge v. Williams*, 397 U.S. 471, 520 n.14 (1970).

²⁴ *See, e.g.,* Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation*, 12 TULSA J. COMP. & INT’L L. 149 (2004); Adam Liptak, *U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008.

²⁵ *Roper*, *supra* note 22. *See also Graham v. Florida*, *supra* note 22.

²⁶ *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

²⁷ *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

The European Court of Human Rights is one of the most respected human rights tribunals in the world. The Court hears cases alleging violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (more commonly known as the “European Convention on Human Rights”) brought against States parties to the Convention, which include the 47 member States comprising the Council of Europe. The Court’s decisions and judgments are binding on States parties to the Convention. While the Court’s decisions are not binding on the U.S., they may serve as persuasive authority, especially if they represent global consensus. For example, in *Lawrence v. Texas*, the Supreme Court considered jurisprudence from the European Court of Human Rights in deciding to strike down a Texas statute criminalizing private sexual activity between consenting adults of the same sex under the Fourteenth Amendment.²⁸

3.4 GENERAL PRINCIPLES AND GUIDELINES

General principles, guidelines and draft international agreements provide a secondary evidence of human rights law.²⁹ Just as a restatement, model code or even Black’s Law Dictionary in the U.S. can provide a secondary source of law in the U.S., principles and guidelines can provide a secondary source of human rights law. The Boston Principles in Section 5.7.8 and the United Nations Guidelines for Consumer Protection listed in Section 5.4.3 are examples of secondary sources of human rights law. Neither the Boston Principles nor the United Nations Guidelines for Consumer Protection are international agreements signed by countries around the world. However, these documents can provide persuasive language, a distilled explanation and even authority for human rights arguments, just as a U.S. restatement and model code can. Moreover, these agreements can provide moral and political authority, and may be evidence of customary international law.³⁰

4. HUMAN RIGHTS LITIGATION IN THE U.S.

Part 4 is designed to give legal aid attorneys in the U.S. the specific information that they need to make persuasive human rights arguments in state and federal court. The human rights arguments are designed to supplement state and federal law-based arguments.

4.1 INTERNATIONAL HUMAN RIGHTS LAW IS DIFFICULT TO ENFORCE DIRECTLY IN U.S. COURTS

Whether created through ratified treaties or as customary law, international law is part of federal law and trumps state law.³¹ International law applies to the states through the Supremacy Clause of the U.S. Constitution, which defines federal law, including ratified treaties, as the supreme law of the land.³² Some state constitutions even include explicit provisions to this effect. In Maryland and West

²⁸ 539 U.S. 558 (2003).

²⁹ RESTATEMENT, Comment I, *supra* note 5 (“General principles are a secondary source of international law.”).

³⁰ Sinai Deutch, *Are Consumer Rights Human Rights?*, 32 OSGOODE HALL LJ 537, 564 (1994).

³¹ Rules of Procedure of the Inter-American Commission on Human Rights, art. 57, OEA/Ser.L./V/I.4, rev. 12 (2008), at www.cidh.org/Basicos/English/Basic.TOC.htm.

³² Human Rights Institute at Columbia Law School, National Economic Social Rights Initiative, Martha F. Davis a Professor of Law at Northeastern University School of Law, Human Rights, Social Justice and State Law: A Manual for Creative Lawyering (Spring 2008), at <http://www.northeastern.edu/law/pdfs/academics/phrge-manual08.pdf>; 44B Am. Jur. 2d International Law § 12 (2008).

Virginia, for example, the state constitutions expressly provide that treaties are the supreme law of the land.³³ Moreover, international obligations must be “implemented at the appropriate government level – federal, state or local.”³⁴

However, unless ratification includes the clear intent that the treaty be directly enforceable by the courts (i.e., “self-executing”), or unless Congress passes implementing legislation, the treaty is not judicially enforceable.³⁵ The Senate typically ratifies human rights treaties with “reservations” affirming that they are not “self-executing,” and the courts uphold this limitation.³⁶ The problem is that Congress has not enacted implementing legislation for most of the human rights conventions that the U.S. has ratified. The major exceptions are the Torture Victims Protection Act (“TVPA”) for the Convention Against Torture (“CAT”) and the International Child Abduction Remedies Act for 1980 Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”).

The TVPA is the implementing legislation for the CAT, and the TVPA states it is “an act to carry out obligations of the U.S. under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”³⁷ However, the TVPA severely limits the scope of enforcement of CAT in the U.S., making it not very useful in terms of enforcement.

The International Child Abduction Remedies Act is the implementing legislation for the Hague Convention and states that this legislation provides “a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.”³⁸ In its reservations, the U.S. specifically pointed out that it would help cover costs and expenses of representation if a legal aid program took this type of case. The Legal Services Corporation recently issued guidance to its grantees clarifying that they may represent foreign indigent parents in these cases.³⁹

Other possibly relevant U.S. legislation related to treaty implementation includes the International Religious Freedom Act, passed by Congress in 1998, which cites the UDHR and the ICCPR and states, “It shall be the policy of the U.S., as follows: (1) To condemn violations of religious freedom, and to

³³ U.S. CONST., art. VI, cl. 2 (“This Constitution, and the Laws of the U.S. which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)

³⁴ U.S. CONST., art. VI, cl. 2; Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev.L. & Soc. Change 366-67 (2006).

³⁵ See U.S. State Department website, at <http://www.state.gov/s/l/38637.htm>.

³⁶ See *Medellin v. Texas*, *supra* note 7 (“not all international law obligations automatically constitute binding federal law enforceable in U.S. courts [...] while treaties may comprise international commitments they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.”); *Igartúa v. United States*, 654 F.3d 99 (11th Cir. 2011) *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2nd Cir. 2005) (“The ICCPR is a signed and ratified treaty, but it came with attached reservations, understandings, and declarations declaring that it is not self-executing. Self-executing treaties generally have the force of domestic law and can be directly enforced by courts. But when a treaty is not self-executing, the treaty does not provide independent, privately enforceable rights.”); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001).

³⁷ Torture Victims Protection Act, P.L. 102-256, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR02092:|TOM:/bss/d102query.html>.

³⁸ 42 U.S.C. § 11607 (a)(4).

³⁹ See U.S. Department of Justice, The Justice Blog, at <http://blogs.justice.gov/main/archives/1855>.

promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion.”⁴⁰

In addition, President Bill Clinton issued an executive order in 1998 ordering U.S. implementation of international human rights treaties “to which it is a party, including the ICCPR, the CAT, and the CERD” which has been codified at 5 USCS § 601.⁴¹

It is important to note here though, that however difficult it is to enforce human rights treaties directly in U.S. courts, many of the principles in the human rights treaties have risen to the level of customary international law. Customary international law does not require implementing legislation to be binding in the U.S. and is binding on U.S. courts.⁴²

4.2 HUMAN RIGHTS LAW ADDS VALUE TO JUDICIAL INTERPRETATION IN THE U.S. WITH SAMPLE ARGUMENTS

In addition to customary international law, which is binding on U.S. courts, there are at least five types of arguments that can be made in state courts that international law has particular value for **judicial interpretation**:⁴³

ARGUMENT 1

The *first* is that the history of certain state constitutions may support, if not compel, looking to foreign and international law for legal interpretation purposes. For example, Maryland’s Declaration of Rights provides in article 2 that treaties are the “Supreme Law of the State.”⁴⁴ You should look to your own state constitution to see if this makes sense.

ARGUMENT 2

The *second* argument is that **international jurisprudence may offer precedent and models that are far more on point for the case at hand than anything in the federal system or even sister states.** Economic and social rights, with some notable exceptions, are still woefully underdeveloped in federal jurisprudence and there are other jurisdictions that have grappled with key issues, such as the relationship between courts and legislatures, the standard of review for positive health or housing rights, and appropriate remedies. Such precedents may represent the only available cases directly on

⁴⁰ International Religious Freedom Act of 1998, P.L. 105-292, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02431:TOM:/bss/d105query.html>.

⁴¹ Exec. Order No. 13107, *supra* note 7.

⁴² RESTATEMENT, *supra* note 5; LOUIS HENKIN, *supra* note 13.

⁴³ This section was adopted from Davis, *supra* note 34.

⁴⁴ Davis, *supra* note 34 (noting that the legislative history of Section 3 of New York’s constitution “Given this context, New York’s state constitutional reference to health can only be properly understood with reference to the international law of public health.”); Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 24 (2004) (tracing the Montana constitution’s provisions on “human dignity” to origins in the UDHR and noting the 1972 amendment to Montana’s constitution, which included the term “human dignity,” was drawn from Puerto Rico’s constitution. Also noting During the drafting of Puerto Rico’s constitution, “the United Nations played a key role, both in inspiring provisions based on the UDHR and as a vehicle for attempted resolution of the Commonwealth’s relationship to the United States”).

point, and thus the most relevant sources of law for state courts developing economic and social rights provisions in their own constitutions.⁴⁵

ARGUMENT 3

The *third* argument is that **state courts should interpret U.S. law as consistent with international law whenever possible.**⁴⁶

ARGUMENT 4

The *fourth* argument is that **where there is no controlling U.S. law, state courts should look to customary international law for guidance for its decision.**⁴⁷

ARGUMENT 5

The *fifth* argument is that **state courts should be part of the transnational dialogue on human rights simply because it is a vital conversation that promotes universal values.** Such participation also enhances (and protects) the image and role of the U.S. in the international community. Only by participation can the U.S. legal community safeguard and build its influence globally. Moreover, participating in that “global conversation” provides an additional framework and bridge for dialogue between states on these compelling issues by offering a common language for judicial exchange.⁴⁸

4.3 SPECIAL CONSIDERATIONS WHEN THE GOVERNMENT IS NOT A PARTY TO THE SUIT

Some, if not most, of the legal issues dealt with by legal aid attorneys do not involve the government as a party. We want legal aid attorneys to be able to make human rights arguments even when the government is not a party to the dispute in a case at hand. However, special thought must be put into human rights arguments made when the government is not a party to the dispute at issue because international human rights conventions by nature bind governments, not private parties.

There are many examples of human rights law arguments that can be made in a dispute between private parties. For example, human rights law and/or international norms can help a court interpret or reinterpret a local statute that is at issue in a dispute between private parties, such as a divorce case where one party might argue that a local statute discriminates against women or same sex partners. Human rights law can also come into play when a party is arguing that they are third party beneficiaries to a contract between the government and a private entity, such as a public housing contractor in an eviction case or a bank in a foreclosure case.

⁴⁵ Davis, *supra* note 34.

⁴⁶ *Id.* at 366.

⁴⁷ *Id.*

⁴⁸ *Id.*

Because human rights obligations bind governments, legal aid attorneys must think carefully when crafting legal arguments to be sure to bring the government into the case as a party or third party, or to address the validity of a statute or regulation capable of being enforced by government officials.

5. SAMPLE ARGUMENT

SAMPLE ARGUMENT: HOUSING RIGHTS

Issue: the Warranty of habitability should include water and sanitation.

The U.S. Supreme Court has recognized that the laws of the U.S. should be interpreted to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (“[T]he laws of the U.S. ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”).

Moreover, under the Vienna Convention on the Law of Treaties, a State that has signed a treaty has an obligation “to refrain from acts which would defeat the object and purpose of a treaty,” unless and until that State has expressed its intention not to become a party. Vienna Convention on the Law of Treaties art. 18, January 27, 1980, 1155 U.N.T.S. 331. While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention’s provisions have become customary international law. *See, e.g., Maria Frankowska, The Vienna Convention on the Law of Treaties Before U.S. Courts*, 28 Va. J. Int’l L. 281, 299-300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

The right to adequate housing, as defined by international law, is comparable [or incompatible] with the [statute/regulation at issue] under domestic law. Under human rights law, the mere fact that the plaintiffs had a roof over their heads is not enough. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which has been signed by the U.S., guarantees everyone the right to “an adequate standard of living for himself and his family, including adequate food, clothing and housing...” art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360, *entered into force* Jan. 3, 1976.

While specifying that the right to adequate housing does not merely mean “having a roof over one’s head,” the U.N. Committee in charge of monitoring and implementing the ICESCR, discussed various elements of the right to adequate shelter. Committee on Economic, Social, and Cultural Rights, General Comment 4, U.N. Doc. E/1992/23 (1991), at <http://bit.ly/IPvRWr>. These elements include the availability of services, materials, facilities, and infrastructure like safe drinking water, sanitation and washing facilities, the habitability of the shelter, and its cultural adequacy. *Id.* Therefore, the term ‘adequate housing’ has an expansive interpretation and “...should be seen as the right to live somewhere in security, peace and dignity.” *Id.* These words starkly contrast with the Plaintiffs circumstances.

Moreover, in September 2010, the U.N. Human Rights Council, an inter-governmental body tasked with promoting and protecting human rights, affirmed “that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.” G.A Res. A/HRC/15/L.14, U.N. HRC, 15th Sess., (2010), at <http://bit.ly/JXht3>.

[Insert the important facts of this case] violates the Plaintiffs’ fundamental human rights under international legal norms.]

For more information, please visit www.WCLCenterforHR.org or contact Local Human Rights Lawyering Project Director, Lauren E. Bartlett by email at bartlett@wcl.american.edu or by phone at (202) 895-4556.